

## Don't Let the Judge Decide!

*Why you absolutely need a will if you have children.*

By Bunker L. Highmark, Esq.\*

When I became an estate planning attorney, several of my married friends approached me about whether or not they “really needed” to have wills. My answer was always the same: While there are good reasons to have basic estate planning documents in place when single, and more so when married, once you have children, it really is no longer optional.

To many, executing an estate plan early in life seems like a waste of time and money. The common misconception is that you execute a will only when you have built up your assets to a point where you have significant wealth to distribute at death.

While a will does dictate how your assets will be distributed, it addresses a number of other critical issues as well – including naming a guardian of your children. Your children’s guardian essentially steps into your parental shoes, as the children will live with and be raised by that guardian, making this one of the most important decisions you will ever face as a parent.

The role of guardian will certainly carry a very different meaning for a 16-year-old child than for one who is only 2 years old, and this can impact whom you choose for that role. You may favor a friend who lives nearby to act as guardian for your 16-year-old son, to ensure that he remains in the same school system, and with his friends, until he goes off to college; whereas you may favor a relative who lives hundreds of miles away, but best embodies your lifestyle and values, for your 2-year-old as she grows up. The key in every case, however, is that you name someone and make that choice effective by executing a will.

Consider the following fairly typical scenario faced by parents when trying to determine who should be named as guardian of their children. Dave and Sally live in Dedham, Massachusetts and are the parents of two young boys, ages 3 and 1. Both sets of grandparents are wonderful, loving people who would raise their grandsons well, and are still young enough to be considered viable options as guardians, but each represents a very different lifestyle in which Dave and Sally’s sons would grow up. Sally’s parents live in the suburbs of Maryland, where they enjoy a typical suburban lifestyle. On the other hand, Dave’s parents run a very successful family business in rural Wisconsin where hunting and camping are common weekend activities. Adding to the dilemma of whom to choose, Dave’s sister is married with 3 children and lives nearby in Lexington, Massachusetts.

Dave and Sally are torn as to whom they wish to name as guardian of their boys. Each of their options certainly offers a loving environment in which their sons would grow up, but each also presents major differences which will shape and affect their boys as they grow. As many couples do, Dave and Sally delay having a will drawn up, because they simply cannot decide whom to choose. If something happens to both of them, and they have not left wills to indicate their wishes, a judge will be forced to make that decision for them. A judge will certainly try to act in the best interests of the children, but can only do so by applying his or her own judgment to

the limited facts presented to the court. The judge does not know Dave and Sally or their extended families. The judge does not know which values and beliefs Dave and Sally consider most important, nor who among the viable options as guardian best represents those values and beliefs.

If you, as parents, are having difficulty determining whom to name as guardian of your children, how can you possibly expect a judge, who does not know you or your family, to make the best decision? If you do not have a will, and therefore have not named a guardian, you are left to hope that the members of your extended family as well as those of your spouse can reach an agreement among themselves, and that only one person (or couple) petitions the court for guardianship. The alternatives, unfortunately, are both common and much less pleasant.

Consider Dave and Sally again. Perhaps they decide to take their first vacation without the kids, and fly off to a remote destination, but something happens and they don't make it back. With no wills in place, the judge is left to weigh the petitions of family members who wish to act as guardians of the boys. Dave's parents in Wisconsin, already limited in the time that they see their grandchildren due to living so far away, may feel that without Dave around, they will see even less of their grandsons, and therefore vigorously fight to obtain guardianship. Of course, as equally loving grandparents, Sally's parents also feel both an obligation and desire to act as guardians and submit a petition for guardianship themselves. Lastly, Dave's sister and her husband believe they are the most natural fit based on their age and proximity to where Dave and Sally lived, and provide a compelling petition of their own to the court.

Not only does the above scenario create a very difficult decision for the judge, but conflicting petitions can many times lead to resentment and hostility, especially in very emotional times. These feelings can linger long after an award of guardianship is made, leading the court-appointed guardian to limit the children's opportunities to see other extended family members (especially those from the other side of the family).

The scenario described above is, sadly, a very real possibility, and is the reason I tell young couples that the moment they have a child, executing a will is no longer something they *should* do, but rather something they *must* do. Certainly the chance that something will happen to both parents is small, but unfortunately, it can and does occur.

Don't leave what could be the final decision you ever make for your children to a judge. *Naming a guardian can be difficult and stressful, but to simply ignore the question can ultimately have a momentous impact on how your children are raised, and who they become.*

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